

**MEMORANDUM**

TO: Legal Sub-team of the Cross-Community Working Group on Enhancing  
ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Response to Questions Re: Unincorporated Associations

DATE: April 23, 2015

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**Overview**

This memorandum responds to the questions regarding unincorporated associations assigned to us on April 23, 2015. Please find below our answers, provided on a general level in keeping with the level of the questions. Please note that we make the same qualifications as in prior memoranda distributed to the Legal Sub-team.

**Question:** What are the administrative formalities to create an unincorporated SO/AC?

**Response:** Under California law, the requirements for forming and operating an unincorporated nonprofit association are minimal and there is great flexibility. Basically the group needs to set out their basic rules and define who members shall be. Simple steps would include:

- Prepare articles of association or another document in the nature of a charter, as the governing document for the group that:
  - describes who qualifies to participate
  - establishes a governance mechanism for decision-making by the participants
  - sets basic procedures for meetings of the participants and
  - addresses any other key management functions that are necessary for the association to operate

Currently the ICANN bylaws address many of these requisites for some of the key groups and these provisions could be crafted into separate and intentional governance documents, with additions as necessary to meet the minimal standard.

- File a statement with the California Secretary of State (there is a prescribed online form) indicating the association's principal address and its agent for service of

process in California. This could be the same as ICANN's. This will establish a formal record with regulatory authorities of the unincorporated association's existence.

**Question: Who (legal persons or individuals) would have to fulfill these formalities? Each member? the Council? The Chair?**

**Response:** These minimal formalities would need to be fulfilled by the group and could be delegated to one or more persons on behalf of the group, for approval by the initial participants. Each unincorporated association would establish and articulate a governance structure in a governing document such as articles of association or a charter, as described above. Officers are not required but could be selected or the group could designate one or more of its participants to undertake the effort to make sure that the minimal formalities are observed.

**Question: Are there any "Officers" or equivalent for such unincorporated SO/AC?**

**Response:** An unincorporated association is not required to have officers. It may have officers if it so desires, but this is not a legal requirement.

**Question: Is there any requisite in terms of funding?**

**Response:** The law does not prescribe any requirements for funding. As with whether or not to have officers, there is flexibility. For example, the unincorporated association's purpose and activity could be limited to participating as a designator or member of ICANN, and if so, may not need any funding at all.

**Question: Does participation of an organization (such as a ccTLD manager) into such an unincorporated SO/AC extend the possibilities that it be sued in the US?**

**Response:** If an organization which is a current participant in ICANN's governance instead (or also) participates in an SO/AC unincorporated association, it will not expose the organization to any greater liability than it already has as a participant in ICANN. ICANN is a public benefit corporation and, under California law, as well as the ICANN bylaws, participants in the governance of ICANN generally would be indemnified by ICANN from liability. The California Corporations Code expressly provides that members of an unincorporated association operated for the public benefit are not liable for the obligations of the association. In addition, it would also be possible for ICANN to continue to provide indemnification for participants in the unincorporated associations that are ICANN's members or otherwise participate in ICANN's governance.

**Question: Can an unincorporated SO/AC be sued? In that case, who would have to pay the legal fees?**

**Response:** Yes, an unincorporated association SO/AC could be sued, as it would be considered a separate legal person under the law. It would also have the capacity to sue others (important for enforcing rights). With regard to legal fees, the default rule in the United States is that each party to a lawsuit bears its own fees and costs, and rules vary by jurisdiction elsewhere. However, the legal fee burden may be shifted by contract. For example, ICANN could have a

contract with a member that provides that ICANN will pay the legal fees of a member who brings suit against ICANN, and conversely, to cover the legal fees of an association (member or designator) that is sued for its work supporting ICANN.

**Question: Is there any fiduciary responsibility of liability attached to being a member of an unincorporated SO/AC? to being a council member? to being chair?**

**Response:** Members of unincorporated associations do not possess fiduciary duties via the California Corporations Code. Nor do officers of unincorporated associations. Instead, the duties and obligations of members and officers are as set forth in the association's governing documents. The governing documents are contractual in nature and can be drafted with great flexibility.

With regard to liability, members, officers and agents are not individually or personally liable for the association's debts or liabilities on the sole basis of their relationship with the association.

**Question: Would the unincorporation of the SO/AC (ex: ccNSO) prevent from further structural reviews of the SO/AC as foreseen by the ICANN Bylaws ?**

**Response:** The organization of an SO/AC as an unincorporated association under California law should not require any change in the procedures set forth in the existing bylaws of ICANN with respect to the SO/AC. Indeed, we had contemplated that the organizational documents of the unincorporated associations would be very short, indicating that the procedures for the governance of each such association are those set forth in the ICANN bylaws, as supplemented by any existing rules or procedures adopted by each SO/AC.